

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

OSURE BROWN, and TOMMY BROWN,
each on their own behalf and on behalf of
other similarly situated persons,

Plaintiffs,

v.

TRANSWORLD SYSTEMS, INC.;
PATENAUDE & FELIX, APC; U.S.
BANK, NA; NATIONAL COLLEGIATE
STUDENT LOAN TRUST 2004-1;
NATIONAL COLLEGIATE STUDENT
LOAN TRUST 2004-2; NATIONAL
COLLEGIATE STUDENT LOAN TRUST
2005-1, NATIONAL COLLEGIATE
STUDENT LOAN TRUST 2005-2;
NATIONAL COLLEGIATE STUDENT
LOAN TRUST 2005-3; NATIONAL
COLLEGIATE STUDENT LOAN TRUST
2006-1; NATIONAL COLLEGIATE
STUDENT LOAN TRUST 2006-2;
NATIONAL COLLEGIATE STUDENT
LOAN TRUST 2007-1; and NATIONAL
COLLEGIATE STUDENT LOAN TRUST
2007-2,

Defendants.

CASE NO. 2:20-cv-00669-DGE

ORDER ON MOTIONS TO
DISMISS

1 This matter comes before the Court on Defendants’ Joint Motion to Dismiss Consolidated
2 Complaint under Fed. R. Civ. P. (“Rule”) 12(b)(6) (Dkt. 165), Defendant Patenaude & Felix
3 APC’s (“P&F”) Motion to Dismiss pursuant to Rule 12(b)(6) (Dkt. 166), Defendant U.S. Bank
4 National Association’s (“U.S. Bank”) Motion to Dismiss Count I and Count V of the
5 Consolidated Complaint under Rule 12(b)(6) (Dkt. 167) and National Collegiate Student Loan
6 Trust Defendants’ 2004-1, 2004-2, 2005-1, 2005-2, 2005-3, 2006-1, 2006-2, 2007-1 and 2007-2
7 (“Trust Defendants”) Separate Motion to Dismiss Count I of the Consolidated Complaint (Dkt.
8 168). Oral argument was requested but is unnecessary to decide the motions.

9 Plaintiff Osure Brown, took out private loans to attend college, and his father Plaintiff
10 Tommy Brown, cosigned for the loans. Dkt. 162. Years later, Plaintiff Osure Brown filed for
11 relief under Chapter 13 of the U.S. Bankruptcy Code. *Id.* After the Defendants filed state court
12 lawsuits attempting to collect on the defaulted loans, the Plaintiffs filed two cases against the
13 Defendants, *Brown v. Transworld Systems Inc.*, Western District of Washington case number 20-
14 669 DGE (Osure’s case) and *Brown v. Transworld Systems Inc.*, Western District of Washington
15 case number 20-680 DGE (Tommy’s case), which were later consolidated under this case
16 number (Osure’s case). Dkt. 152.

17 The Plaintiffs’ Consolidated Complaint asserts claims for violations of the Fair Debt
18 Collection Practices Act, 15 U.S.C. 1692, *et. seq.* (“FDCPA”), Washington’s Consumer
19 Protection Act, RCW 19.86, *et. seq.* (“CPA”), and for invasion of privacy. Dkt. 162. The
20 Plaintiffs contend that the Defendants knew that they could not prove that the Trust Defendants
21 own the student loan debts, so all Defendants violated the FDCPA, CPA, and invaded their
22 privacy by bringing meritless state court debt collection lawsuits. *Id.*

1 The Defendants now move to dismiss the Plaintiffs' claims (Dkts. 165-168). For the
2 reasons provided below, the motions should be granted, in part, and denied as moot, in part, and
3 Plaintiffs' FDCPA claims, and a part of their CPA claims, should be dismissed.

4 **I. FACTS, PROCEDURAL HISTORY, AND PENDING MOTIONS**

5 **A. SOURCE OF BACKGROUND FACTS**

6 The Plaintiffs argue that the Court should only consider the facts alleged in the
7 Consolidated Complaint in deciding these Rule 12(b)(6) motions or should convert the motions
8 into summary judgment motions. Dkt. 172. This issue should be resolved before the
9 background facts are considered.

10 When evaluating the sufficiency of a pleading in a Rule 12(b)(6) motion, a court reviews
11 allegations in the complaint. *Koala v. Khosla*, 931 F.3d 887, 894 (9th Cir. 2019). It may also
12 consider any attachments to the complaint or documents incorporated in the complaint by
13 reference. *Id.*; *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003)(noting certain written
14 instruments attached to a pleading may be considered part of the pleading). Further, a court may
15 consider facts subject to judicial notice pursuant to Fed. R. Evid. 201 when considering a motion
16 to dismiss under Rule 12(b)(6). *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th
17 Cir. 2018).

18 Fed. R. Evid. 201(b) permits a court to notice a fact if it is "not subject to reasonable
19 dispute" because it is "generally known," or "can be accurately and readily determined from
20 sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(1)–(2). "[A]
21 court may take judicial notice of matters of public record without converting a motion to dismiss
22 into a motion for summary judgment. But a court cannot take judicial notice of disputed facts
23 contained in such public records." *Khoja* at 999 (*quotation marks and citation omitted*).

Matters properly subject to judicial notice include undisputed facts in the record of Osure Brown's bankruptcy case *In re Brown*, U.S. Bankruptcy Court for the Western Dist. of Washington case number 12-21878 ("*In re Brown*"), and the findings and holding of the Ninth Circuit Court of Appeals decision from the order denying the Defendants' motion to dismiss in this case, *Brown v. Transworld Systems*, 73 F.4th 1030, 1036 (9th Cir. 2023) ("*Brown*"). The Court will consider undisputed facts from pleadings and orders in these cases. Further, the Court will consider allegations in the Consolidated Complaint (Dkt. 162), attachments to the Consolidated Complaint (e.g. Dkt. 162-4), and documents incorporated by reference in the Consolidated Complaint. Accordingly, to the extent the Plaintiffs move to convert the pending motions to dismiss to summary judgment motions, the motion (Dkt. 172) should be denied. There is no need to consider other documents.

B. BACKGROUND FACTS

From 2003 to 2007, Osure Brown took out ten student loans to attend college. *Brown* at 1036; also Dkt. 162 at 4. His father, Tommy Brown, cosigned for the loans. *Id.*

1. Osure Brown's Bankruptcy

On November 11, 2012, Osure Brown filed a petition for relief under Chapter 13 of the U.S. Bankruptcy Code. *In re Brown*, Dkt. 1.¹ In his Schedule F "Creditors Holding Unsecured Nonpriority Claims," Osure Brown represented, under the penalty of perjury, that "National Collegiate Trust" was one of his student loan creditors. *In re Brown*, Dkt. 1 at 19-20. Osure Brown represented that Tommy Brown was a "codebtor" in Schedule H of his bankruptcy petition for creditor "National Collegiate Trust." *In re Brown*, Dkt. 1 at 22.

¹ All references in this section, "Osure Brown's Bankruptcy" are to the bankruptcy court docket in *In re Brown*.

1 On February 15, 2013, Osure Brown filed an amended Chapter 13 Plan, which provided
2 that “[a]fter month 36, all available plan payments after [the secured debt] is paid in full, shall be
3 distributed to the non-dischargeable student loan creditors only, ECMC, American Educational
4 Services, National Collegiate Trust, Permant Recovery Inc. and any other unknown student loan
5 lenders.” *In re Brown*, Dkt. 12 at 5. The bankruptcy court confirmed the plan. *In re Brown*,
6 Dkt. 13. In April of 2013, the Trust Defendants filed ten proofs of claims in Osure Brown’s
7 bankruptcy estate. *In re Brown*, Dkt. 16 at 2. Osure Brown did not file objections to these
8 proofs of claims. *See In re Brown*. The bankruptcy court issued an order of discharge for all
9 dischargeable debts on December 29, 2017. *In re Brown*, Dkt. 24. The discharge order
10 explained that while “most” debts were discharged, “debts for most student loans” were not
11 discharged. *Id.* No objection was raised to the bankruptcy court’s discharge order. *See In re*
12 *Brown*. The bankruptcy trustee submitted his Final Report and Account, and the bankruptcy case
13 was closed on March 8, 2018. *In re Brown*, Dkt. 26. The parties dispute whether the student
14 loans at issue here were discharged, but a finding on this issue is unnecessary to decide these
15 motions.

16 2. Defendants’ Debt Collection Efforts and State Court Proceedings

17 According to the Consolidated Complaint filed in this case, in October of 2018, the
18 Defendants began efforts to collect the student loans, which they contended were in default. Dkt.
19 162 at 15. Defendant U.S. Bank was the loans’ servicer. *Id.* at 7. The Trust Defendants hired
20 Defendant Transworld Systems, Inc. (“Transworld”) to collect the allegedly defaulted loans and
21 hired P&F, a law firm specializing in debt collection, to represent the Trust Defendants in the
22 state court debt collection cases. Dkt. 162; *Brown* at 1036.

1 On February 16, 2019, the Trust Defendants served the Browns with copies of ten unfiled
2 complaints for debt collection. *Brown* at 1036. The Consolidated Complaint alleges that on
3 April 5, 2019, the Trust Defendants filed the ten complaints against the Browns in King County,
4 Washington Superior Court, representing each of the ten student loans. Dkt. 162 at 16. Along
5 with the state court complaints, the Trust Defendants filed affidavits by a Transworld employee,
6 Jennifer Audet. *Id.* In the affidavits, Ms. Audet claimed that, based on personal knowledge of
7 the pertinent records, she'd verified that the subject loan had been "transferred, sold and
8 assigned" to one of the Trust Defendants and that there was a principal balance outstanding on
9 the loan. *Id.* Ms. Audet's affidavit had several attachments purporting to show that the loans
10 belonged to one of the Trust Defendants. *Id.* The ten state debt collection cases were
11 consolidated in one case. *Id.* When Osure and Tommy Brown questioned whether the debts
12 were properly assigned to the Trust Defendants in a summary judgment motion, the Trusts
13 replaced Ms. Audet's affidavits with an affidavit from Bradley Luke, another Transworld
14 employee. *Id.* at 17. Like the Audet affidavits, the Luke affidavit also claimed to show that the
15 Trusts owned the loans. *Id.* at 17-18. The state court ruled that the Luke affidavit was
16 inadmissible hearsay "because Mr. Luke does not have the ability to testify about the documents
17 being business records since he is not employed by the entity that has custody and possession of
18 the records and he does not have knowledge of the retention policies of the alleged predecessor's
19 in interest . . ." Dkt. 162-4 at 4-5 (Attachment C to the Consolidated Complaint). The state court
20 granted the Browns' motion for summary judgment (without the Luke Affidavit, the Trust
21 Defendants did not prove ownership of the loans) and dismissed the Trust Defendants' debt
22 collection case on December 24, 2019. Dkt. 162-4. The Trusts did not appeal the judgment.
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1 **C. PROCEDURAL HISTORY**

2 On April 6, 2020, Osure Brown filed this case in state court, and it was removed to this
3 Court. Dkt. 1. As stated above, Tommy Brown also filed a state court case, which was removed
4 to this court (20-680 DGE). Although filed as class actions, no class has been certified.

5 In his original complaint in this case, Osure Brown contended the Defendants were liable
6 under the FDCPA under two alternative theories: (1) for violating the bankruptcy discharge
7 order and (2) by filing 10 meritless state court debt collection lawsuits. Dkt. 5-2.

8 On February 17, 2022, this court dismissed the FDCPA claims based on violation of the
9 bankruptcy discharge order as being precluded by *Walls v. Wells Fargo Bank*, 276 F.3d 502 (9th
10 Cir. 2002). Dkt. 120. To the extent the FDCPA claims were based on filing the state court debt
11 collection lawsuits, this court held that the claims were barred by the FDCPA's one year statute
12 of limitations because the case was filed over one year after the Browns were served with the
13 unfiled complaints. *Id.*

14 On appeal, the Ninth Circuit affirmed the decision dismissing the claims based on
15 violation of the bankruptcy discharge order. *Brown* at 1037. The Ninth Circuit reversed the
16 decision regarding the statute of limitations on FDCPA claims based on the theory of the
17 Defendants' knowing pursuit of the ten meritless debt collection lawsuits. *Id.* It held that there
18 were two allegations which might support timely FDCPA claims: (1) the date that the complaints
19 were filed (not just when they were served), and (2) when the Luke affidavit was filed in
20 response to the motion for summary judgment. *Id.* at 1039-1046. The Ninth Circuit indicated
21 that its opinion was limited to the issues raised and concluded:

22 Finally, Brown argues that because the state court found that the Trusts lacked
23 admissible evidence to demonstrate ownership of the debt, we must give "full
24 faith and credit" to that decision by directing judgment for Brown on his FDCPA
claim. This argument fails. The state court found that Defendants failed to present

sufficient evidence to show that they owned the debts, but did not address the issue in this case: whether Defendants knowingly brought a meritless lawsuit in violation of the FDCPA. The Supreme Court has explicitly said that it does not see how the fact that a debt-collection lawsuit turns out ultimately to be unsuccessful could, by itself, make the bringing of it an action that cannot legally be taken. While the state court's decision could possibly be evidence in support of Brown's FDCPA claim, this lawsuit does not in any way "relitigate" the issues in the state court action.

Id. at 1046.

After the Ninth Circuit issued its mandate and remanded this case, the parties agreed to consolidate this case with Tommy Brown's case (20-680 DGE). Dkt. 151. They also agreed to file the Consolidated Complaint and a briefing schedule for motions to dismiss, if any. *Id.* The Plaintiffs filed their Consolidated Complaint (Dkt. 162) which asserts the following claims: Count I: violation of the FDCPA, Count II: Conspiracy to violate the CPA, Count III: violation of the CPA, Count IV: per se violation of the CPA due to violation of FDCPA, Count V: declaratory and injunctive relief for violations of the FDCPA and CPA, and Count VI: invasion of privacy. Dkt. 162. They seek damages, declaratory and injunctive relief, attorneys' fees, and costs. *Id.*

D. PENDING MOTIONS

In their joint motion to dismiss, all Defendants argue that Osure Brown's claims are barred by claim preclusion, issue preclusion, and judicial estoppel because years after taking out the student loans, Osure filed for relief under Chapter 13 of the Bankruptcy Code and expressly represented in the bankruptcy that the Trust Defendants own his loans. Dkt. 165. Defendant U.S. Bank and the Trust Defendants move separately to dismiss the FDCPA claims asserted against them, arguing that they are not debt collectors as defined under the FDCPA. Dkts. 167 and 168. Defendant P&F moves to dismiss the Plaintiffs' Count IV, per se violation of the CPA based on a violation of FDCPA, arguing that the theory fails as a matter of law. Dkt. 166.

1 The Plaintiffs oppose the motions. The Defendants filed replies to the Plaintiffs’
2 oppositions. The motions are ripe for decision.

3 II. DISCUSSION

4 A. AVAILABILITY OF MOTIONS TO DISMISS

5 Relying on Rule 12(g)(2), the Plaintiffs argue that the Defendants’ motions to dismiss are
6 improper and should be stricken because they raise new grounds for dismissal that should have
7 been raised in the prior motions to dismiss, before the Ninth Circuit Court of Appeals, and in the
8 state court collection actions. Dkt. 178-1. Plaintiffs contend that the Defendants waived their
9 claim preclusion, issue preclusion and judicial estoppel arguments. *Id.*

10 The Plaintiffs’ motion to strike (Dkt. 178-1) should be denied and the Defendants’
11 motions to dismiss should be considered. The Defendants raised the issue of judicial estoppel in
12 their prior motion to dismiss before this Court. Dkt. 62 at 18-19 (“Defendants’ Joint Motion to
13 Dismiss Amended Complaint”). When this Court considered the Defendants’ first motion to
14 dismiss, it did not reach the Defendants’ judicial estoppel argument because it granted the
15 motion on other grounds. Dkt. 120. The Ninth Circuit Court of Appeals reversed the district
16 court decision on other grounds. *See Brown*, 73 F.4th 1030. While the Plaintiffs argue that the
17 law of the case doctrine bars consideration of claim preclusion, issue preclusion and judicial
18 estoppel, they fail to demonstrate how such consideration applies here.

19 Further, the instant motions to dismiss were filed after the parties stipulated to Plaintiffs
20 filing a Consolidated Complaint and stipulated to a briefing schedule for motions to dismiss.
21 The instant motions were in response to the allegations in the Consolidated Complaint. The
22 parties considered that motions to dismiss may be filed when they agreed to the new schedule.
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Moreover, Rule 12(g) provides that, “[e]xcept as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.” In the Ninth Circuit, “[t]he consequence of omitting a defense from an earlier motion under Rule 12 depends on type of defense omitted. A defendant who omits a defense under Rules 12(b)(2)–(5)—lack of personal jurisdiction, improper venue, insufficient process, and insufficient service of process—entirely waives that defense.” *In re Apple iPhone Antitrust Litig.*, 846 F.3d 313, 317 (9th Cir. 2017)(citing Rule 12(h)(1)(A)). On the other hand, a defendant who omits a defense under Rule 12(b)(6) in an earlier motion does not waive that defense. *Id.* at 317-18. “Rule 12(g)(2) provides that a defendant who fails to assert a failure-to-state-a-claim defense in a pre-answer Rule 12 motion cannot assert that defense in a later pre-answer motion under Rule 12(b)(6), but the defense may be asserted in other ways,” including in a motion to dismiss under Rule 12(c) (after the pleadings are closed). *Id.* (citing Rule 12(h)(2)). The standards for reviewing a motion to dismiss under Rule 12(b)(6) and under Rule 12(c) are the same. *See Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 n.4 (9th Cir. 2011). Further, Rule 1 provides that the federal rules “should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.” Forcing the Defendants to wait to file their motions to dismiss until after they have filed answers slows the case down and is an unnecessary expense. In accord with Rule 1 and in the interests of judicial economy, the Defendants’ Rule 12(b)(6) motions to dismiss for failure to state a claim should be considered now. *In re Apple iPhone* at 318.

The Plaintiffs contend that the Defendants failure to raise the preclusive effect of the bankruptcy court’s judgment and to assert judicial estoppel against them in the state court debt

1 collection actions bars the Defendants from raising those issues now. Dkt. 178-1. The Plaintiffs
2 fail to point to any authority for this proposition. There is no showing that the Defendants were
3 forced to raise these issues in the state court debt collection cases (as the plaintiffs there) to prove
4 ownership of the loans. In any event, if a court in the Ninth Circuit gives the parties an
5 opportunity to address the issue, it may raise preclusion considerations *sua sponte*. *Hawkins v.*
6 *Risley*, 984 F.2d 321, 324 (9th Cir. 1993). Defendants' motions to dismiss should be considered.

7 **B. MOTION TO DISMISS STANDARD**

8 Rule 12(b)(6) motions to dismiss may be based on either the lack of a cognizable legal
9 theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v.*
10 *Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1990). Material allegations are taken as
11 admitted and the complaint is construed in the plaintiff's favor. *Keniston v. Roberts*, 717 F.2d
12 1295 (9th Cir. 1983). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not
13 need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement
14 to relief requires more than labels and conclusions, and a formulaic recitation of the elements of
15 a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554-55
16 (2007)(*internal citations omitted*). "Factual allegations must be enough to raise a right to relief
17 above the speculative level, on the assumption that all the allegations in the complaint are true
18 (even if doubtful in fact)." *Id.* at 555. The complaint must allege "enough facts to state a claim
19 to relief that is plausible on its face." *Id.* at 547.

20 Although for purposes of a Rule 12(b)(6) motion to dismiss the court ordinarily credits
21 the allegations in the complaint as true, it need not "accept as true allegations that contradict
22 matters properly subject to judicial notice, . . . by exhibit," or incorporated by reference into the
23 complaint. *Gonzalez v. Planned Parenthood of Los Angeles*, 759 F.3d 1112 (9th Cir. 2014);
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1 *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295-96 (9th Cir. 1998)(the court is “not
2 required to accept as true conclusory allegations which are contradicted by documents referred to
3 in the complaint”).

4 **C. CLAIM PRECLUSION, ISSUE PRECLUSION, AND JUDICIAL ESTOPPEL**

5 The Plaintiffs maintain that the Defendants violated the FDCPA, the CPA and invaded
6 their privacy when Defendants pursued the ten state court debt collection cases while knowing
7 that they could not prove that the Trust Defendants owned the loans. The Defendants argue that
8 Plaintiffs’ claims are barred by claim preclusion, issue preclusion, and judicial estoppel because
9 of Osure Brown’s representations and actions/inaction in his federal bankruptcy case. Each will
10 be considered.

11 Federal law of claim and issue preclusion apply because it is the preclusive effect of a
12 federal court judgment (the bankruptcy court) that is at issue. *GP Vincent II v. Estate of Beard*,
13 68 F.4th 508, 514 (9th Cir. 2023).

14 1. Claim Preclusion

15 Res judicata or claim preclusion “bars litigation in a subsequent action of any claims that
16 were raised or could have been raised in the prior action.” *GP Vincent* at 514. It applies if the
17 earlier litigation: “(1) reached a final judgment on the merits, (2) involved the same claim or
18 cause of action as the later lawsuit, and (3) involved the same parties or their privies.” *Id.* The
19 doctrine applies to matters decided in bankruptcy. *Siegel v. Fed. Home Loan Mortgage Corp.*,
20 143 F.3d 525, 528 (9th Cir. 1998).

21 The first requirement, that the bankruptcy court reached a final judgment on the merits, is
22 met. *GP Vincent* at 514. The bankruptcy court’s approval of the Trust Defendants’ proofs of
23 claims was a final judgment on the merits. “The allowance or disallowance of a claim in
24

1 bankruptcy is binding and conclusive on all parties or their privies, and being in the nature of a
2 final judgment, furnishes a basis for a plea of res judicata.” *Siegel* at 529.

3 The second claim preclusion requirement is met – the earlier litigation involved the same
4 claim. *GP Vincent* at 514. As it is here, the Trust Defendants’ ownership of the loans and the
5 propriety of the proofs of claims were squarely at issue in the bankruptcy case. Osure Brown
6 affirmatively represented to the bankruptcy court, under penalty of perjury, that he owed the
7 Trust Defendants, and others, over \$200,000 in student loans. Osure Brown represented that
8 Tommy Brown was a “codebtor” for creditor “National Collegiate Trust.” The bankruptcy court
9 approved Osure Brown’s plan. After the Trust Defendants filed their proofs of claims, Osure
10 and Tommy Brown failed to object. The bankruptcy court allowed the Trust Defendants’ claims.
11 Although Osure and Tommy Brown now collaterally attack the Trust Defendants’ bankruptcy
12 proofs of claims as fraudulent, such an argument is “within the exclusive jurisdiction of the
13 bankruptcy court,” *Brown* at 1039, and is barred here. In any event, no objections were raised to
14 the petition’s discharge. Osure Browns’ affirmative representations and failure to object bar
15 Plaintiffs’ challenge to the Defendant Trusts’ ownership of the loans in this case.

16 The third requirement for claim preclusion is met – the same parties or privies are
17 involved in both proceedings. Osure Brown and the Trust Defendants were parties in the
18 bankruptcy. As a named codebtor in the bankruptcy, Tommy Brown is in privity with Osure
19 Brown. Tommy Brown’s interest and Osure Brown’s interest in the bankruptcy as it relates to
20 the student loans were “so closely aligned as to be virtually representative.” *In re Schimmels*,
21 127 F.3d 875, 881 (9th Cir. 1997)(*internal quotation marks and citations omitted*).

22 Claim preclusion “bars all grounds for recovery that could have been asserted, whether
23 they were or not, in a prior suit between the same parties on the same cause of action.” *Siegel* at
24

528-29 (*cleaned up*). It operates to bar the Plaintiffs' claims, which are based on the Trust Defendants not owning his loans or not being able to prove that they own his loans, here.

2. Issue Preclusion

"Issue preclusion applies when (1) the issue at stake was identical in both proceedings; (2) the issue was actually litigated and decided in the prior proceedings; (3) there was a full and fair opportunity to litigate the issue; and (4) the issue was necessary to decide the merits." *Love v. Villacana*, 73 F.4th 751, 754 (9th Cir. 2023). "A final judgment is afforded preclusive effect even if erroneous." *Id.*

The Plaintiffs' claims that are premised on the Trust Defendants' not owning the student loans or their inability to prove that the Trust Defendants own the loans are also barred by issue preclusion. The first requirement – identical issues - is met. *Love* at 754. The issue of whether the Trust Defendants owned the loans and could collect on them was at issue in the bankruptcy and is at issue in this case.

The second issue preclusion requirement is met – the issue was actually litigated. *Love* at 754. Osure Brown represented that he owed the Trust Defendants for the student loans, the Trust Defendants filed proofs of claims, and the Browns did not object to the Trust Defendants' proofs of claims.

The third requirement is met – there was a full and fair opportunity to litigate who owned the loans. *Love* at 754. In addition to not objecting to the proofs of claims or the petition's discharge, Osure Brown affirmatively represented that he owed the Trust Defendants on the debts. All parties had an opportunity to litigate the issues.

The fourth issue preclusion requirement is met – the issue was necessary to decide the merits. *Love* at 754. To decide whether to approve the Trust Defendants' proofs of claims, the

1 bankruptcy court had to decide that the Trust Defendants owned the loans and could collect
2 them. Issue preclusion also bars the Plaintiffs' claims based on the Trust Defendants not
3 owning, or being able to prove they owned, the loans.

4 3. Judicial Estoppel

5 Judicial estoppel "precludes a party from gaining an advantage by asserting one position,
6 and then later seeking an advantage by taking a clearly inconsistent position." *Hamilton v. State*
7 *Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001). In addition to applying within the
8 same case, the application of judicial estoppel is appropriate to bar litigants from making
9 incompatible statements in two different cases. *Id.* at 783.

10 Factors courts may consider in applying judicial estoppel include whether: (1) the party's
11 later position is "clearly inconsistent," with their earlier position, (2) the party was successful in
12 persuading a court in the earlier case such that "judicial acceptance of an inconsistent position in
13 a later proceeding would create the perception that either the first or the second court was
14 misled," and (3) the party seeking to assert an inconsistent position would have an unfair
15 advantage or impose an unfair detriment on the opposing party. *Id.* at 782-783 (*internal*
16 *quotation marks and citations omitted*)(*cleaned up*). For the doctrine of judicial estoppel to
17 apply, the prior court must have relied on the allegedly incompatible statement. *Id.* at 783.

18 The Browns' position in this case, that the Defendants violated the FDCPA, CPA and
19 invaded their privacy because Defendants knew they couldn't prove that the Trust Defendants
20 owned the loans, is clearly inconsistent with Osure Brown's position that he owed the Trust
21 Defendants for the student loans and his failure to object to the Trust Defendants' proofs of
22 claims. Osure Brown represented that he owed the debt, did not object to the Trust Defendants'
23 proofs of claims, and received a discharge order. The bankruptcy court relied on his assertions.

1 This Court's acceptance of Plaintiffs' current position - that the Trust Defendants cannot prove
2 that they own the loans – considering his prior position, that the Trust Defendants own his loans
3 and could collect them - “creates the perception” that either this Court or the bankruptcy court
4 has been misled.

5 Moreover, the Defendants properly point out that Osure Brown received an advantage by
6 not disputing that he owed the loans to the Trust Defendants in the bankruptcy. If he had
7 disputed the debts, the Trust Defendants could have filed an adversary proceeding to adjudicate
8 ownership of the student loan debts and contested dischargability. They could have sought
9 payments under the bankruptcy plan or moved to have the bankruptcy converted to a Chapter 7
10 plan, forcing the liquidation of Osure Brown's assets. Osure Brown should be judicially
11 estopped from asserting that the Trusts do not own his student loans and that the Trusts can't
12 prove that they own the loans.

13 4. Conclusion

14 Although it was very difficult to find Plaintiffs' argument responsive to the motion within
15 Plaintiff's Oppositon (sic) to Defendant's Joint Motion to Dismiss (Dkt. 178-1), this Court
16 believes that Plaintiffs' position has been fairly determined and understood. (Plaintiffs'
17 Oppositon (sic) was replete with discussions of the merits of their position in the pending case,
18 which was of only slight relevance to the pending motion.)

19 Plaintiff Osure Brown took out student loans. His father, Plaintiff Tommy Brown, co-
20 signed for them. Later, Osure Brown filed for bankruptcy protection. In that process, publicly
21 and under oath, he listed his student loans in his bankruptcy as Student Loan Obligations totaling
22 \$256,189.39. *In re Brown*, Dkt. 1 at 38 and Schedule F. He did not object to the Trust
23 Defendants' proofs of claims.

1 Plaintiffs now seek to have those loans disappear so they can attack purported student
2 loan creditors for the way they have prosecuted attempts to collect on those loans. The Court
3 finds nothing that changes the status of those student loans. There may be difficulties in proving
4 up the collectivity of the loans; but they are still Plaintiff Osure Brown's loans, because he listed
5 them under oath as his obligations, and that relationship has not changed since 2012. He cannot
6 now bring a case that assumes those debts have disappeared and gives Plaintiffs the right to sue
7 creditors for attempts to collect on the unpaid debts.

8 To the extent their claims are based on the Trust Defendants not owning or being able to
9 prove ownership of the student loans, those claims are barred by the doctrines of claim
10 preclusion, issue preclusion, and judicial estoppel. To the extent the Plaintiffs move for
11 summary judgment in their favor, the motion (Dkt. 178-1) should be denied. They have not
12 shown that they are entitled to a judgment as a matter of law. Rule 56.

13 **D. FDCPA CLAIM**

14 Aside from their theory that the Defendants violated the FDCPA by pursuing state court
15 debt collection actions when Defendants knew that either the Trust Defendants did not own the
16 debts or that the Defendants could not prove that the Trust Defendants owned the debts, the
17 Plaintiffs' Consolidated Complaint fails to plead any other facts which could be construed as a
18 violation of the FDCPA. Accordingly, their FDCPA claims: Count I (violation of FDCPA) and a
19 portion of Count V (declaratory and injunctive relief for violation of the FDCPA) should be
20 dismissed for failure to state a claim under Rule 12(b)(6).

21 Defendant U.S. Bank's Motion to Dismiss Count I and Count V of the Consolidated
22 Complaint under Rule 12(b)(6) (Dkt. 167) and the Trust Defendants' Separate Motion to Dismiss
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Count I of the Consolidated Complaint (Dkt. 168), both of which assert additional grounds to dismiss the FDCPA claims made against them, should be denied as moot.

E. CPA CLAIMS

The Plaintiff's Count VI, *per se* violation of the CPA based on FDCPA violations, should be dismissed for failure to state a claim. The Plaintiffs failed to state a FDCPA claim and so failed to state a *per se* CPA violation claim. Count IV, should be dismissed under Rule 12(b)(6). Defendant P&F's motion to dismiss the Plaintiffs' Count IV on other grounds (Dkt. 166) should be denied as moot.

Violations of the CPA require a plaintiff to establish "five distinct elements: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 780 (1986).

To the extent the Plaintiffs base their remaining CPA claims, Count II: conspiracy to violate the CPA, Count III: violation of the CPA, and a portion of Count V: declaratory and injunctive relief on the CPA claim, on the Defendants pursuing state court debt collection actions when Defendants knew that either the Trust Defendants did not own the debts or that the Defendants could not prove that the Trust Defendants owned the debts, the claims should be dismissed pursuant to Rule 12(b)(6). The parties do not address whether there are other bases for the Plaintiffs' CPA claims.

F. INVASION OF PRIVACY CLAIM

The parties do not address the Plaintiffs' Count VI: invasion of privacy. Like the FDCPA and the CPA claims, to the extent the invasion of privacy claims are based on the Defendants pursuing state court debt collection actions when Defendants knew that either the Trusts did not

own the debts or that the Defendants could not prove that the Trusts owned the debts, the invasion of privacy claim should be dismissed under Rule 12(b)(6).

III. ORDER

It is **ORDERED** that:

- Defendants' Joint Motion to Dismiss Consolidated Complaint under Rule 12(b)(6) (Dkt. 165): **IS GRANTED**;
 - Plaintiffs' FDCPA claims **ARE DISMISSED**;
 - To the extent that Plaintiffs' CPA and invasion of privacy claims are based on Defendants pursuing state court debt collection actions when Defendants knew that either the Trust Defendants did not own the debts or that the Defendants could not prove that the Trust Defendants owned the debts, the CPA and invasion of privacy claims **ARE DISMISSED**; other grounds to prevent dismissal have not been argued, and do not show bases to avoid dismissal; and
- Defendants remaining motions (Dkts. 166, 167 and 168) **ARE DENIED AS MOOT**.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing pro se at said party's last known address.

Dated this 16th day of September, 2024.



ROBERT J. BRYAN
United States District Judge